

ST 97-42

Tax Type: SALES TAX

Issue: Responsible Corp. Officer - Failure to File or Pay Tax

STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS

---

THE DEPARTMENT OF REVENUE	)	
OF THE STATE OF ILLINOIS	)	
	)	No.
v.	)	IBT
	)	NPL
	)	
JOHN DOE & ROBERT DOE,	)	Daniel D. Mangiamele
Responsible Officer of	)	Administrative Law Judge
CORPORATION, Inc.	)	
Taxpayer	)	

---

**RECOMMENDATION FOR DISPOSITION**

**Appearances:** William Gullberg of Gullberg & Jordan, for JOHN DOE & ROBERT DOE; Marc Muchin, Special Assistant Attorney General, for the Illinois Department of Revenue.

**Synopsis:**

These matters comes on for hearing pursuant to the taxpayers' timely protests of Notices of Penalty Liability No. XXXX and XXXX, issued by the Department on August 24, 1994. At issue is whether the taxpayers were responsible corporate officers of CORPORATION, Inc. who willfully failed to remit Retailers' Occupation Tax and/or Use Tax, as well as related taxes when due to the State of Illinois in the amount of \$24,214.57. Following the submission of all evidence and a review of the record, it is recommended that these matters be resolved in favor of the Department.

**Findings of Fact:**

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Notices of Penalty Liability (NPL) No. XXXX and XXXX against JOHN DOE and ROBERT DOE, respectively, covering the period April 1991, August through November 1991, January 1992 through May 1992 and July 1992 (hereinafter referred to as the "liability period"). Dept. Ex. No. 1

2. JOHN DOE was president and ROBERT DOE was secretary of CORPORATION, Inc., the underlying corporation. Dept. Ex. No. 2

3. Sales tax returns were filed, paid and signed by ROBERT DOE during the audit period. Dept. Ex. No. 3; Tr. pp. 11, 13, 27

4. ROBERT DOE and JOHN DOE had the authority to write checks. Tr. pp. 13, 28, 30

5. CORPORATION, Inc. the underlying corporation had real estate loans with Blackhawk State Bank.

6. Farmers State Bank had a security interest on the inventory owned by CORPORATION, Inc. Tr. pp. 19-20

7. ROBERT DOE had the authority to hire and fire employees. Tr. p. 32

8. JOHN DOE was aware as of August 1991 of the weak financial condition of the business. Tr. p. 14

9. ROBERT DOE in April of 1992 dealt with Farmers State Bank and Blackhawk State Bank in an attempt to keep CORPORATION from foreclosure.

10. ROBERT DOE had the responsibility of selling the inventory when Farmers State Bank foreclosed. Tr. pp. 24-25

11. Farmers State Bank filed foreclosure on the inventory on May 13, 1992. Tr. p. 22

12. JOHN DOE gave advice to his son ROBERT DOE during the audit period. Tr. p. 35

13. JOHN DOE had equal stock ownership with ROBERT DOE in CORPORATION, Inc. Tr. pp. 35-36

14. ROBERT DOE collected money from sales, paid payroll and operating expenses during the audit period. Tr. p. 40

**Conclusions of Law:**

On examination of the record established, these taxpayers failed to demonstrate by the presentation of testimony or through exhibits, evidence sufficient to overcome the Department's *prima facie* case of personal liability under the assessment in question. Accordingly, by such failure, and under the reasoning given below, the Department's determinations of penalty liability must stand. In support thereof, the following conclusions are made.

During the audit period herein the Retailers' Occupation Tax Act (ROTA) 35 ILCS 13.5 provides as follows:

Any officer or employee of any corporation subject to the provision of the Act who has the control, supervision or responsibility of filing returns and making payment of the amount of tax herein imposed in accordance with Section 3 of this Act and who willfully fails to file such return or make such payment to the Department or willfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax evaded, including interest and penalties thereon.

As can be seen, in order to be subjected to this penalty, a person must (1) be an employee or officer of the corporation, (2) have control, supervision or responsibility for filing returns and paying the taxes, and (3) willfully fail to file the returns, pay the tax or otherwise evade or defeat the tax.

A *prima facie* case for officer liability may be established by the Department through introduction of its Notice of Penalty Liability. The Illinois Supreme Court has stated:

that under Section 13 1/2 of the Act, the Department's establishment of a prima facie case for a tax penalty operates, in effect, as a rebuttal presumption of willfulness. In addition to establishing the amount of penalty due and the person responsible for paying the taxes, the Department's *prima facie* case for a tax penalty presumes willfulness. To rebut the presumption, the person defending against the penalty must adduce sufficient evidence to disprove willful failure to file returns and pay taxes.

Branson v. Department of Revenue, 168 Ill. 2d 247, 659 N. E. 2d 961, (1995).

Nothing in the evidence presented by taxpayers serve to overcome the Department's *prima facie* case with respect to the penalty assessed against JOHN DOE or ROBERT DOE.

In this matter ROBERT DOE stipulated and admitted through his testimony that he was a responsible corporate officer who managed and had control of the business. The record indicates he was an equal shareholder and officer with his father JOHN DOE during the liability period. He further testified he was responsible for paying bills and payroll in addition to selling off the company's inventory when its creditor bank started foreclosure proceedings. The record indicates that no monies were paid to the Department of Revenue for the

CORPORATION, Inc. tax liability while ROBERT DOE was selling inventory and winding down the business.

Based on the above evidence I find this taxpayer has not overcome the Department's *prima facie* case of personal liability. His actions are willful since he preferred to pay other creditors instead paying his tax liability to the Department of Revenue. See Department of Revenue v. Heartland Investments, Inc. 106 Ill. 2d 19, (1985) Department of Revenue v. Joseph Publick & Sons, Inc. 68 Ill. 2d 568 (1977). Ruth v. United States 823 F.2d 1091, (7th Cir. 1987).

JOHN DOE, the father, was not present at the hearing. No evidence was offered on his behalf to rebut the Departments *prima facie* case of willfulness other than his son's allegation that his father was an investor. In Branson v. Department of Revenue, 168 Ill. 2d 247, 559 N.E. 2d 96, (1995) the Court stated on page 267 "we do not intend to imply that a corporate officer who is responsible for filing Retailers' Occupation Tax returns and remitting the collected taxes may avoid personal liability under Section 13 1/2 merely by delegating bookkeeping duties to third parties and failing to inspect corporate records or otherwise failing to keep informed of the status of the Retailers' Occupation Tax returns and payments."

The father was the president and as such had a duty to be mindful of what was occurring under his direction as president of the corporation. The record disclosed the following conduct of JOHN DOE, the father:

1. JOHN DOE was president of the underlying corporation and a shareholder.

2. He gave advice to his son in the operation of the business.
3. He was a signatory on the company check book.
4. A TAXPAYER signed some of the sales tax returns. Dept. Ex. No. 3

In Department of Revenue v. Heartland Investments, Inc. 106 Ill. 2d (1985) the court held that willfull failure to pay requirement was met by evidence that the Retailers' Occupation taxes collected were knowingly used to pay corporate creditors other than the Department of Revenue. Further, in Ruth v. United States, 823 F. 2d. 1091 (7th Cir. 1987), willfulness may be established by a showing of "gross negligence involving a known risk of violation," as where a responsible party clearly ought to have known of a "grave risk of non payment" and who is in a position to easily find out, but does nothing.

Once the Notices of Penalty Liability were admitted into evidence the Department established its *prima facie* case pursuant to the above cited statutory provisions. The burden therefore shifted to the taxpayers to rebut the presumption created with competent evidence. It is my determination that no evidence was proffered by either taxpayer to rebut the presumption of willfulness and therefore, I find that these taxpayers were willful in the failure to pay taxes due.

On the basis of the foregoing findings of fact and conclusions of law, I recommend that the Notices of Penalty Liability contained herein be finalized plus penalties and interest to date.

---

Administrative Law Judge

